

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

FILED BY CLERK

JAN 30 2008

COURT OF APPEALS
DIVISION TWO

PETER WICKRAMASEKERA,)	
)	
Petitioner/Appellant,)	2 CA-CV 2007-0081
)	DEPARTMENT B
)	
v.)	<u>MEMORANDUM DECISION</u>
)	Not for Publication
HON. WENDY HERNANDEZ, Judge of)	Rule 28, Rules of Civil
the Tucson City Court,)	Appellate Procedure
)	
Respondent/Appellee,)	
)	
STATE OF ARIZONA,)	
)	
Real Party in Interest.)	
_____)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. C20071248

Honorable Deborah Bernini, Judge

VACATED AND REMANDED

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E S P I N O S A, Judge.

¶1 Appellant Peter Wickramasekera appeals the superior court’s declination of jurisdiction of his statutory special action challenging the Tucson City Court’s order that his dog be humanely destroyed. The state concedes the superior court should have accepted jurisdiction and considered the merits of Wickramasekera’s claim. We agree and remand the case to the superior court for that purpose.

¶2 Wickramasekera is the owner of Speck, a male, mixed-breed, pit bull dog. In October 2006, after two previous biting incidents at Wickramasekera’s home, Speck attempted to bite a student on the property of a nearby school. After that incident, Pima County Animal Control (PCAC) conducted a dangerous-dog assessment, declared Speck a dangerous animal, and, pursuant to Tucson City Code (T.C.C.) § 4-13(a), required Wickramasekera to keep Speck confined under specific conditions. Wickramasekera did not challenge PCAC’s determination that Speck was dangerous, although he was entitled to a hearing pursuant to T.C.C. § 4-13(d) and an appeal to superior court from any adverse decision following such a hearing.

¶3 In January 2007, PCAC was informed Speck was loose “on the lawn of the church where the school is located.” When officers approached the dog, he was “very aggressive” and then eluded capture. Wickramasekera refused to surrender Speck to PCAC, a warrant was obtained, and two days later, Speck was seized from Wickramasekera’s home. At that time, Wickramasekera’s brother and mother, who lived in the home, both stated to animal control officers they were afraid of the dog. Wickramasekera requested a hearing in Tucson City Court to challenge PCAC’s impoundment of the dog under T.C.C. § 4-11. At

that hearing, the city magistrate found Speck to be dangerous, vicious, and a “danger to the safety of any person,” noting Speck’s unpredictable and aggressive behavior, his previous biting incidents and attacks on PCAC officers, and Wickramasekera’s inability to control the dog or understand what situations triggered Speck’s aggressive behavior. Based on these factors, the magistrate ordered that Speck be “humanely destroyed.”¹

¶4 Wickramasekera filed a “special action complaint” in Pima County Superior Court pursuant to T.C.C. § 4-11(k), which provides for appellate review “by way of special action to the superior court on the record of the hearing.” The superior court declined jurisdiction and Wickramasekera filed a motion for reconsideration, which the court denied. Wickramasekera then filed a notice of appeal, seeking this court’s review of the superior court’s declination of jurisdiction.

¶5 Addressing *sua sponte* our jurisdiction in this case, *see State v. Poli*, 161 Ariz. 151, 153, 776 P.2d 1077, 1079 (App. 1989), we first note that there is no statute that permits an appeal to be taken from a decision of the superior court in a civil action appealed from a justice, police, or city court decision.² *See* A.R.S. § 22-425 (“Either party may appeal from a municipal court to the superior court in the same manner as appeals are allowed from justice of the peace courts.”); A.R.S. § 22-261 (establishing right to appeal to superior court justice court decision in civil case involving an amount in controversy exceeding twenty

¹The magistrate also ordered Speck not be destroyed until after Wickramasekera’s time for appeal had expired or his appeal was complete.

²Limited review is provided for criminal actions originating in limited jurisdiction courts. *See* A.R.S. § 22-375.

dollars and cases contesting “the validity of a tax, impost, assessment, toll or a statute of the state”). And Rule 14(b), Superior Court Rules of Appellate Procedure—Civil, prohibits any further appeal “from a final decision or order of the superior court under these rules, except where the action involves the validity of a tax, impost, assessment, toll, statute or municipal ordinance.” Wickramasekera is not seeking monetary relief and has not challenged the validity of T.C.C. § 4-11; therefore, this court lacks jurisdiction over his appeal.

¶6 However, A.R.S. § 12-120.21(A)(4) grants this court “[j]urisdiction to hear and determine petitions for special actions brought pursuant to the rules of procedure for special actions, without regard to its appellate jurisdiction.” Thus, we may, in our discretion, treat this appeal as a petition for special action, accept special action discretion, and determine whether the superior court acted in excess of its legal authority, or arbitrarily and capriciously in declining jurisdiction of Wickramasekera’s special action. *See Danielson v. Evans*, 201 Ariz. 401, ¶ 35, 36 P.3d 749, 759 (App. 2001); *Lloyd v. State Farm Mutual Auto. Ins. Co.*, 189 Ariz. 369, 375, 943 P.2d 729, 735 (App. 1996). “Special action jurisdiction may be assumed to correct a plain and obvious error committed by the trial court.” *State v. Superior Court*, 184 Ariz. 409, 410, 909 P.2d 476, 477 (App. 1995); *see also Luis A. v. Bayham-Lesselyong*, 197 Ariz. 451, ¶ 2, 4 P.3d 994, 996 (App. 2000) (special action jurisdiction proper when “justice cannot be obtained by other means”). Accordingly, we accept jurisdiction in this case.

¶7 Because the superior court did not reach the merits of Wickramasekera’s petition below, the single issue before us is “whether the trial court abused its discretion

when it declined to accept jurisdiction.” *Bilagody v. Thorneycroft*, 125 Ariz. 88, 92, 607 P.2d 965, 969 (App. 1979). As noted above, T.C.C. § 4-11 provides a right to appellate review of a city court magistrate’s decision through the procedural mechanism of a “special action to the superior court.” Similar statutory language providing a right to review by special action petition has been construed as creating a statutory special action. *See Book Cellar, Inc. v. City of Phoenix*, 139 Ariz. 332, 336 n.2, 678 P.2d 517, 521 n.2 (App. 1983) (construing language in A.R.S. § 9-462.06 providing for “a complaint for special action to review the board decision” as creating non-discretionary special action to superior court from board of adjustment); *see also Circle K Convenience Stores, Inc. v. City of Phoenix*, 178 Ariz. 102, 103, 870 P.2d 1198, 1199 (App. 1993) (same).

¶8 A statutory special action is created when “a statute expressly authorizes proceedings under certiorari, mandamus, or prohibition.” Ariz. R. P. Spec. Actions 1(b). This court has described statutory special actions as “not at all discretionary and . . . not subordinate to a right of appeal—they are the right of appeal.” *Circle K*, 178 Ariz. at 103, 870 P.2d at 1199, *quoting* Ariz. R. P. Spec. Actions 1, State Bar Committee note at 192. In *Book Cellar*, 139 Ariz. at 336, 678 P.2d at 521, Division One of this court held that statutory language that specifically provided “[a] person aggrieved . . . may, at any time within thirty days after the board has rendered its decision, file a complaint for special action in the superior court” would, when applicable, “have the effect of eliminating the Superior Court’s discretion regarding acceptance of jurisdiction of this type of special action since it is now a statutory special action.”

¶9 Because T.C.C. § 4-11³ expressly provides a right to appeal through a “special action to the superior court,” we conclude the superior court erred in declining jurisdiction of Wickramasekera’s petition and in failing to address his claims.⁴ Thus, having accepted jurisdiction, we grant relief, vacating the superior court order and remanding this matter to that court for proceedings consistent with this decision.

PHILIP G. ESPINOSA, Judge

CONCURRING:

PETER J. ECKERSTROM, Presiding Judge

GARYE L. VÁSQUEZ, Judge

³Although our ruling is premised on the terms of a city ordinance rather than a state statute, we see no reason to construe it differently in this situation and neither party has claimed or suggested otherwise.

⁴We recognize Wickramasekera did not provide the superior court with a record of the city court proceedings, which may require the superior court to assume the record would support the magistrate’s judgment. *See In re Property at 6757 S. Burcham Ave.*, 204 Ariz. 401, ¶ 11, 64 P.3d 843, 846-47 (App. 2003) (appellate court assumes record not provided supports trial court decision); T.C.C. § 4-11(k) (appeal shall be “on the record of the hearing”).